

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HUNTERS CAPITAL, LLC, a Washington
limited liability company, et al., on behalf of
themselves and others similarly situated,

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant.

Case No. 2:20-cv-00983 TSZ

STIPULATED DIGITAL
EXAMINATION AGREEMENT AND
ORDER

STIPULATED DIGITAL EXAMINATION AGREEMENT AND ORDER

Hunters Capital, LLC, et al. (“Plaintiffs”) and the City of Seattle (the “City”) jointly agree to this stipulation and order (“Agreement”), which sets forth the full agreement between Plaintiffs and the City for the inspection of forensic images or backups of certain City-issued cellular telephones used by specific City officials¹ (“Cell Phone Data”).

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¹ The relevant City officials are Mayor Jenny Durkan, former Police Chief Carmen Best, Fire Chief Harold Scoggins, Idris Beauregard, Christopher Fisher, Ken Neafcy, Eric Greening (the “Individuals”).

1 **1. Purpose**

2 The purpose of this Order is to (1) provide Plaintiffs' forensic provider, Brandon Leatha
3 ("Forensic Expert"), with access to the Cell Phone Data for testing, and (2) establish a protocol for
4 delivery to the City of any lost or missing data recovered by the Forensic Expert.

5 **2. Source Materials to Forensic Expert**

6 The City shall provide the Forensic Expert with a detailed log of all sources of
7 electronically stored information ("ESI") that it has searched to produce text messages from the
8 Individuals in this case, including any cloud-based storage accounts (the "Log"). The Log shall
9 include available details about each source, including the make, model, serial number, or other
10 identifying information. Within fourteen days of the execution of this Agreement, the City shall
11 provide copies of any Cell Phone Data that were obtained by City's forensics experts to the
12 Forensic Expert. The Cell Phone Data shall not be provided directly to Plaintiffs' counsel.

13 If the Forensic Expert identifies additional sources of text message ESI not included in
14 the Log, Plaintiffs may request that the City collect this data ("Additional Cell Phone Data") and,
15 if they do, the parties will meet and confer (*see* FRCP 26(f)) regarding the request within ten (10)
16 business days. Any Additional Cell Phone Data that the City agrees to collect will be provided
17 to the Forensic Expert within ten (10) days of the agreement. The parties agree to use the
18 procedure set forth in LCR 37(a)(2) for any disputes regarding the collection of Additional Cell
19 Phone Data or its provision to the Forensic Expert.

20 The City will make (1) Mayor Durkan's City-issued "cracked screen" iPhone 8, (2) Chief
21 Best's iPhone that she returned to the City on September 2, 2020, and (3) Chief Scoggins' iPhone
22 that was factory reset in October 2020 available to the Forensic Expert for a physical inspection at
23 a mutually agreeable time and place. Any such physical inspection shall occur via video
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conference if a device is located outside the State of Washington at the time Plaintiffs request to inspect it. During the physical inspection of the devices, the Forensic Expert may look at only the following areas of the phone: the IMEI number, the serial number, the SMS retention settings, back-up information (iCloud or otherwise), the date of the last factory reset, the text messages and messaging apps (only to confirm the dates of available messages). No changes shall be made to any device settings during the physical inspection. The parties' counsel shall not participate in the physical inspection of any cell phone device.

3. Assessment of Cell Phone Data

Subject to the terms of this Agreement, the City shall make the Cell Phone Data available to the Forensic Expert for analysis. The Cell Phone Data will be provided to the Forensic Expert in the same form that it was collected by the City.

The Cell Phone Data shall be subject to the following procedures:

- a) **Transfer of Cell Phone Data to Forensic Expert.** The Forensic Expert shall obtain the Cell Phone Data from the City at a mutually agreed upon date and time but before October 31, 2021.
- b) **Data Storage.** The Cell Phone Data shall be stored on encrypted media and shall be retained in a secure evidentiary or forensic lab at all times. Any transfer or transmittal of the Cell Phone Data shall be on encrypted media.
- c) **Forensic Analysis of Images.** The Forensic Expert shall perform forensic analysis of the Cell Phone Data for the time period of June 1, 2020 to October 31, 2020 and provide the results of the forensic analysis in a report format to both parties. The Forensic Expert shall start by analyzing the data from the cellular phones of Mayor Durkan, Chief Best, Chief Scoggins, and Idris Beauregard. The Forensic Expert shall prepare a report relating to the remaining Cell Phone Data only at the request of Plaintiffs' counsel. This forensic analysis shall be marked "confidential" pursuant to the parties' Protective Order, and shall include the following:
 - **Device Summary:** The report should detail each cellular phone, including the device make, model, version, serial number, and other identifying information, as well as the operating system,

version, and installed software or applications.

- **Meta Data Regarding Text Message Settings:** To the extent that any Individual's text message ESI is not available due to change(s) to text message retention settings, the report should detail any changes to the "com.apple.mobileSMS.plist," "KeepMessageForDays," and "KeepMessagesVersionID" files and any other relevant facts relating to these changes.
- **Communications Applications:** The report should detail the use of any communications applications on the Individuals' City-issued cellular phones from June 1, 2020 to July 31, 2020, and any evidence that such communications applications were downloaded, updated, and/or removed from the subject devices. Examples of communications applications include Facebook Messenger, Twitter, Skype, Snapchat, WeChat, WhatsApp, Signal, Viber, Tencent, Slack, Telegram, Line, Kik Messenger, Kakao Talk, iMessage, GroupMe, Element, eBuddy XMS, Discord, SMS/MMS, and other similar communications applications. In addition, the report should detail the presence and date range of any communications from these applications included in the Cell Phone Data (but not provide any information about the content of the communications).
- **Metadata Regarding Factory Reset:** To the extent that any Individual's text message ESI is not available due to a factory reset, the report should detail the date, location, time, and any other relevant facts relating to the factory reset.
- **Metadata Regarding Failed Credentials:** To the extent that any Individual's text message ESI is not available due to failed credentials, the report should detail the date, location, time, and any other relevant facts relating to the failed credentials.
- **USB and External Storage:** This report should detail the use of external storage devices including USB flash drives, hard drives, CD/DVD, SD cards, cellular phones, cameras, and other removable or portable storage devices that may have been used to store the Individuals' ESI and provide a detailed description of any such device.
- **File Deletion:** This report should detail all activity that may have eliminated text message ESI from the Individuals' cellular phones.
- **Data Wiping and Hiding:** This report should detail the use of

file wiping, disk cleaning, file encryption, or other anti-forensic tools or techniques which may have been used to eliminate or limit access to any text message ESI stored on the Individuals' cellular phones.

- **Comparison of ESI Available Versus Sources of ESI Searched:** The report should identify any sources of text message ESI identified by the Forensic Expert but not identified in the Log.
- **Comparison of Forensic Images and Backups:** The report should detail any differences between (1) the Cell Phone Data, and (2) the data the Forensic Expert would expect to obtain from such forensic images or backups.

The forensic report prepared by the Forensic Expert may not excerpt and/or append any data and/or artifacts that are relevant to the report without first receiving confirmation from the City that the information is not privileged or protected. The City shall have 14 calendar days to review the forensic report prepared by the Forensic Expert, after which the Forensic Expert may produce the forensic report to Plaintiffs' counsel. If the City requests the redaction of any portion of the report, the requested redaction(s) shall be made, and the City shall identify the applicable privilege or protection on a privilege log within 30 calendar days of the production of the forensic report to Plaintiffs.

4. Additional Sources of Text Message ESI to Be Identified

The Forensic Expert shall provide the parties with a detailed description of any sources of text message ESI it discovers that were not identified in the Log. The Agreement Regarding Discovery of Electronically Stored Information and Order (Dkt. 39) shall govern the search and production of any such ESI.

5. Miscellaneous

Nothing in this Agreement shall be deemed to constitute a waiver of any objection that any Party may have to any pending or future discovery request or deposition question, nor shall this

1 Agreement prevent any Party from objecting to production of documents or objecting to other
2 discovery requests on any available grounds, or from seeking alternative protective orders from
3 the Court.

4 Nothing in this Agreement shall affect the right of a Party or non-party to disclose or use
5 any information and items that it has designated as “Confidential” or “Attorney’s Eyes Only.”

6 Nothing in this Agreement shall prohibit any Party from moving the Court for modification
7 of this Agreement for good cause.

8 The Forensic Expert will maintain the Cell Phone Data in confidence and disclose its work
9 only to the extent authorized by this Agreement, a further agreement of the parties, or as ordered
10 by the Court. The Forensic Expert will destroy the Cell Phone Data upon a final order being issued
11 by the Court or, if an appeal is filed, after an appellate mandate terminating the case.

12 Except as specifically provided in this Agreement, the terms, conditions, and limitations of
13 this Agreement shall survive the termination of the above-captioned action.

14 Production pursuant to this Agreement shall not waive the parties’ rights to object to the
15 introduction of the evidence at trial.

16 **6. Disputes Relating to this Order**

17 The parties agree to utilize the procedure set forth under LCR 37(a)(2) for any disputes
18 pertaining to the enforcement of this Order.

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1 DATED this 8th day of October, 2021.

2 SO STIPULATED:

3 **CALFO EAKES LLP**

PETER S. HOLMES

Seattle City Attorney

4
5 By /s/Gabriel Reilly-Bates

/s/ Joseph Groshong

6 Patricia A. Eakes, WSBA #18888
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1 **II. ORDER**

2 IT IS SO ORDERED.

3
4 Dated this _____ day of _____, 2021.

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6
7

UNITED STATES DISTRICT JUDGE

8
9 Presented by:

10
11 **CALFO EAKES LLP**

12 By /s/Gabriel Reilly-Bates

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